In the Supreme Court

Appeal from the Michigan Court of Appeals

Theresa O'Day DeRose
(aka Theresa Seymour),
Plaintiff/Third-Party Defendant-Appellee

v

Joseph Allen DeRose,
Defendant-Appellee,

v

Catherine DeRose,
Third-Party Plaintiff-Appellant.

Supreme Court No.121246
Court of Appeals No. 232780
Trial Court No. 97-734836-DM

BRIEF ON APPEAL-APPELLANT

PROOF OF SERVICE

LAW OFFICES OF RICHARD S. VICTOR, PLLC
By: Richard S. Victor (P24827)
Daniel R. Victor (P64703)
Scott Bassett (P33231)
Attorneys for Appellant
100 W. Long Lake Rd., Ste. 250
Bloomfield Hills, MI 48304
248-646-7177

LAW OFFICES OF
RICHARD S. VICTOR, PLLC
100 WEST LONG LAKE ROAD • SUITE 250 • BLOOMFIELD HILLS, MI 48304 • TELEPHONE (248) 646-7177 • FACSIMILE (248) 646-9722

State of Michigan
Supreme Court

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Plaintiff/Third-Party Defendant-Appellee,
v

Joseph Allen DeRose,
Defendant,
v

Catherine DeRose,
Third-Party Plaintiff-Appellant.

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Sarah J. Biggs (P43745)
Douglas Hamel (P29768)
Attorney for Appellee
13112 Trenton Rd.
Southgate, MI 48195
734-281-3666

LAW OFFICES OF
RICHARD S. VICTOR, PLLC
By: Richard S. Victor (P24827)
By: Daniel R. Victor (P64703)
By: Scott Bassett (P33231), Of Counsel
Attorneys for Appellant
100 W. Long Lake Rd., Ste. 250
Bloomfield Hills, MI 48304
248-646-7177

THIRD PARTY PLAINTIFF-APPELLANT'S
BRIEF ON APPEAL
PROOF OF SERVICE

"THE APPEAL INVOLVES A RULING THAT A PROVISION OF THE CONSTITUTION, A STATUTE, RULE OR REGULATION, OR OTHER STATE GOVERNMENTAL ACTION IS INVALID"

LAW OFFICES OF RICHARD S. VICTOR, PLLC
By: Richard S. Victor (P24827)
By: Daniel R. Victor (P64703)
By: Scott Bassett (P33231), Of Counsel
Attorneys for Appellant
100 W. Long Lake Rd., Ste. 250
Bloomfield Hills, MI 48304
248-646-7177
November 30, 2002

LAW OFFICES OF
RICHARD S. VICTOR, PLLC
100 WEST LONG LAKE ROAD • SUITE 250 • BLOOMFIELD HILLS, MI 48304 • TELEPHONE (248) 646-7177 • FACSIMILE (248) 646-9722

STATEMENT IDENTIFYING JUDGMENT/ORDER APPEALED FROM AND RELIEF SOUGHT

Third-Party Plaintiff-Appellant, Catherine DeRose, seeks to have the January 25, 2002 published opinion of the Michigan Court of Appeals, declaring Michigan's grandparent visitation statute unconstitutional, and the March 11, 2002, order of the Michigan Court of Appeals, denying her motion for rehearing, vacated and remanded to the trial court. Both the opinion and order were decided by a divided panel, with Judge Jessica R. Cooper dissenting from both determinations.

This case is of enormous importance to thousands of Michigan children and their grandparents. Children from single-parent families, whether the result of divorce or the death of one of their parents often have meaningful and psychologically important relationships with their grandparents. Unless the Court of Appeals opinion is reversed by this Court, family division judges in Michigan will no longer have the important discretion to order grandparenting time over the objection of the child's parent or parents, even if the parental decision is directly contrary to the child's best interests.

A majority of state appellate courts addressing the issue subsequent to the U.S. Supreme Court decision in Troxel v Granville have upheld the constitutionality of narrowly drawn statutes like Michigan's providing for grandparent visitation.

LAW OFFICES OF
RICHARD S. VICTOR, PLLC
100 WEST LONG LAKE ROAD • SUITE 250 • BLOOMFIELD HILLS, MI 48304 • TELEPHONE (248) 646-7177 • FACSIMILE (248) 646-9722

QUESTIONS PRESENTED FOR REVIEW

A. Whether the Court of Appeals erred in invalidating Michigan's already restrictive grandparent visitation statute, MCL 722.27b, on constitutional grounds.

Plaintiff/Third-Party Defendant-Appellee:	No
Defendant:	Did Not Participate
Third-Party Plaintiff-Appellant:	Yes
Court of Appeals:	No
Trial Court:	Yes

B. Whether the Court of Appeals erred in finding the "best interests of the child" legal standard provides inadequate guidance to the trial courts in ruling on motions/actions for grandparenting time.

Plaintiff/Third-Party Defendant-Appellee:	No
Defendant:	Did Not Participate
Third-Party Plaintiff-Appellant:	Yes
Court of Appeals:	No
Trial Court:	Yes

LAW OFFICES OF
RICHARD S. VICTOR, PLLC
100 WEST LONG LAKE ROAD • SUITE 250 • BLOOMFIELD HILLS, MI 48304 • TELEPHONE (248) 646-7177 • FACSIMILE (248) 646-9722

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LAW OFFICES OF
RICHARD S. VICTOR, PLLC
100 WEST LONG LAKE ROAD • SUITE 250 • BLOOMFIELD HILLS, MI 48304 • TELEPHONE (248) 646-7177 • FACSIMILE (248) 646-9722

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LAW OFFICES OF
RICHARD S. VICTOR, PLLC
100 WEST LONG LAKE ROAD • SUITE 250 • BLOOMFIELD HILLS, MI 48304 • TELEPHONE (248) 646-7177 • FACSIMILE (248) 646-9722

LAW OFFICES OF
RICHARD S. VICTOR, PLLC
100 WEST LONG LAKE ROAD • SUITE 250 • BLOOMFIELD HILLS, MI 48304 • TELEPHONE (248) 646-7177 • FACSIMILE (248) 646-9722

STATUTES:

COURT RULES:

LAW OFFICES OF
RICHARD S. VICTOR, PLLC
100 WEST LONG LAKE ROAD • SUITE 250 • BLOOMFIELD HILLS, MI 48304 • TELEPHONE (248) 646-7177 • FACSIMILE (248) 646-9722

CONCISE STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

The following is taken from the Counter-Statement of Facts included in the Brief on Appeal filed with the Court of Appeals by Third-Party Plaintiff-Appellant's prior counsel:

> Appellee Theresa Seymour filed for divorce in 1997. Appellee's divorce became final in May 1998. Appellee and Joseph DeRose are the parents of Shaun Ashleigh DeRose (DOB 4/1/1996).
>
> Appellant, the paternal grandmother, filed a pro per motion for visitation, and the first hearing was held on March 10, 1998. The conclusion of the Friend of the Court at that time was that Grandmother lacked standing.
>
> Appellant retained counsel, objected to the findings of the Friend of the Court, and a new investigation was ordered. In a written investigation dated February 24, 2000, Friend of the Court recommended supervised visitation with the minor child and the paternal grandmother. Over Appellee Mother's objections, that recommendation was adopted by the court in an order dated June 12, 2000.
>
> Plaintiff-Appellee filed a timely Motion for Reconsideration with the trial court. That Motion was eventually denied on December 19, 2000. In the meantime, Appellant Grandmother had filed a motion to enforce visitation. Following a hearing at Friend of the Court and a De Novo hearing in the trial court, that motion was finalized on February 5, 2001, with the order of June 12, 2000 being upheld.
>
> The issue here is the treatment by the court of the June 12, 2000 Motion to Adopt the Recommendation of the Friend of the Court. That recommendation had three components; that the paternal Grandmother would have supervised visitation on alternate Saturdays from noon to 2:00 p.m. for eight months, that beginning with the ninth month, the paternal Grandmother have supervised visitation on alternate Saturdays from noon until 4:00 p.m. and that the Paternal Grandmother not discuss any matters pertaining to her son's incarceration with the minor child. (Transcript of motion hearing of 06/12/00 pp 2 and 3.)
>
> It is crucial to this whole matter that Appellee at no point argued that such visitation would not be in the best interest of the minor child. Rather the Appellee exclusively confined her argument to allegations that the visitation with the subject minor child would be detrimental to a separate minor child who is a sibling of the subject minor child and over whom the court has no

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RICHARD S. VICTOR, PLLC
100 WEST LONG LAKE ROAD • SUITE 250 • BLOOMFIELD HILLS, MI 48304 • TELEPHONE (248) 646-7177 • FACSIMILE (248) 646-9722

> jurisdiction. Accordingly, it is to [sic] this issue that the trial Court spent most of it's time responding. (Transcript of motion hearing of 06/12/00 pp 5-11.)
>
> Nonetheless, despite no ascertation [sic] by Appellee that grandparent visitation would not be in the interests of the subject minor child, the Court does find that visitation would be in the interests of the subject minor child. (Transcript of motion hearing of 09/12/00 pp 11 and 12.)

Brief on Appeal, pp 1-1a. As is obvious from the above excerpt, the facts were not well-developed at the trial court level. No testimony was taken by the trial court and this matter was treated as a purely legal question. For that reason, if this Court reverses the Court of Appeals and determines that Michigan's grandparent visitation statute is constitutional, it may want to remand this matter to the trial court for the taking of testimony on the "best interests" issue.

Procedurally, the plaintiff/third-party-appellee erroneously filed a claim of appeal from the trial court's order for grandparent visitation. That appeal was dismissed for lack of jurisdiction. She then filed a delayed application for leave to appeal. The Court of Appeals, in an order dated May 9, 2001, granted the delayed application, stayed the order, and set an expedited briefing schedule.

Oral argument took place in the Court of Appeals on October 8, 2001. Approximately two weeks later, the Court of Appeals released its published opinion in ***Heltzel v Heltzel, 248 Mich App 1 (2001)***. On January 25, 2002, the Court of Appeals released its published opinion in this matter. In a 2-1 decision, Michigan's grandparenting time statute, ***MCL 722.27b***, was held facially unconstitutional, a majority of the panel finding that the statute failed to provide adequate guidance to the trial courts in determining whether

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RICHARD S. VICTOR, PLLC
100 WEST LONG LAKE ROAD • SUITE 250 • BLOOMFIELD HILLS, MI 48304 • TELEPHONE (248) 646-7177 • FACSIMILE (248) 646-9722

grandparent visitation should be granted.

At that point, the third-party plaintiff-appellant, Catherine DeRose, secured the pro bono legal services of counsel and a timely motion for rehearing was filed with the Court of Appeals. On March 11, 2002, the Court of Appeals issued an order denying the rehearing motion by the same 2-1 margin as the original opinion.

The third-party plaintiff-appellant sought leave to appeal to this Court from the January 25, 2002, published opinion and the March 11, 2002, order denying rehearing. On October 8, 2002, this Court issued an order granting leave to appeal on the issue of the constitutionality of the statute, facially or as applied to this case.

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RICHARD S. VICTOR, PLLC
100 WEST LONG LAKE ROAD • SUITE 250 • BLOOMFIELD HILLS, MI 48304 • TELEPHONE (248) 646-7177 • FACSIMILE (248) 646-9722

ARGUMENT

Introduction: The decision of the Court of Appeals is clearly erroneous from both constitutional and statutory perspectives. It will cause material injustice to the third-party plaintiff-appellant and thousands of children and grandparents throughout Michigan if the Court of Appeals decision is affirmed. Finally, the intermediate Court's decision conflicts with a prior published decision of the Michigan Court of Appeals in ***Heltzel v Heltzel, 248 Mich App 1 (2001)***.

Standard of Review: Because this case involves interpretation of case and statutory law, the opinion of the Court of Appeals is reviewed for legal error. ***Fletcher v Fletcher, 447 Mich 871, 881-882; 526 NW2d 889 (1994).***

The Statute in Question: The Court of Appeals in the instant case invalided Michigan's grandparent visitation statute, ***MCL 722.27b***. This statute has been in effect for two decades and has been applied thousands of times by trial courts throughout Michigan. In its current form, the statute states:

> Sec. 7b. (1) Except as provided in this subsection, a grandparent of the child may seek an order for grandparenting time in the manner set forth in this section only if a child custody dispute with respect to that child is pending before the court. If a natural parent of an unmarried child is deceased, a parent of the deceased person may commence an action for grandparenting time. Adoption of the child by a stepparent under chapter X of Act No. 288 of the Public Acts of 1939, being sections 710.21 to 710.70 of the Michigan Compiled Laws, does not terminate the right of a parent of the deceased person to commence an action for grandparenting time.
> (2) As used in this section, "child custody dispute" includes a proceeding in which any of the following occurs:
> (a) The marriage of the child's parents is declared invalid or is dissolved by the court, or a court enters a decree of legal separation with regard to the marriage.

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RICHARD S. VICTOR, PLLC
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(b) Legal custody of the child is given to a party other than the child's parent, or the child is placed outside of and does not reside in the home of a parent, excluding any child who has been placed for adoption with other than a stepparent, or whose adoption by other than a stepparent has been legally finalized.

(3) A grandparent seeking a grandparenting time order may commence an action for grandparenting time, by complaint or complaint and motion for an order to show cause, in the circuit court in the county in which the grandchild resides. If a child custody dispute is pending, the order shall be sought by motion for an order to show cause. The complaint or motion shall be accompanied by an affidavit setting forth facts supporting the requested order. The grandparent shall give notice of the filing to each party who has legal custody of the grandchild. A party having legal custody may file an opposing affidavit. A hearing shall be held by the court on its own motion or if a party so requests. At the hearing, parties submitting affidavits shall be allowed an opportunity to be heard. At the conclusion of the hearing, if the court finds that it is in the best interests of the child to enter a grandparenting time order, the court shall enter an order providing for reasonable grandparenting time of the child by the grandparent by general or specific terms and conditions. If a hearing is not held, the court shall enter a grandparenting time order only upon a finding that grandparenting time is in the best interests of the child. A grandparenting time order shall not be entered for the parents of a putative father unless the father has acknowledged paternity in writing, has been adjudicated to be the father by a court of competent jurisdiction, or has contributed regularly to the support of the child or children. The court shall make a record of the reasons for a denial of a requested grandparenting time order.

(4) A grandparent may not file more than once every 2 years, absent a showing of good cause, a complaint or motion seeking a grandparenting time order. If the court finds there is good cause to allow a grandparent to file more than 1 complaint or motion under this section in a 2-year period, the court shall allow the filing and shall consider the complaint or motion. The court may order reasonable attorney fees to the prevailing party.

(5) The court shall not enter an order restricting the movement of the grandchild if the restriction is solely for the purpose of allowing the grandparent to exercise the rights conferred in a grandparenting time order.

(6) A grandparenting time order entered in accordance with this section shall not be considered to have created parental rights in the person or persons to whom grandparenting time rights are granted. The entry of a grandparenting time order shall not prevent a court of competent jurisdiction from acting upon the custody of the child, the parental rights of the child, or the adoption of the child.

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RICHARD S. VICTOR, PLLC
100 WEST LONG LAKE ROAD • SUITE 250 • BLOOMFIELD HILLS, MI 48304 • TELEPHONE (248) 646-7177 • FACSIMILE (248) 646-9722

(7) The court may enter an order modifying or terminating a grandparenting time order whenever such a modification or termination is in the best interests of the child.

A. The Court of Appeals erred in invalidating Michigan's already restrictive grandparent visitation statute, MCL 722.27b, on constitutional grounds.

Summary of Argument A: Subsequent to the U.S. Supreme Court's decision in *Troxel v Granville, 530 US 57, 120 S Ct 2054, 147 L Ed 2d 49 (2000)*, a clear majority of state supreme and appellate courts have affirmed the constitutionality of grandparent visitation statutes that are drawn more narrowly than the Washington statute that was at issue in *Troxel*. The Michigan statute is much more narrowly drawn than the Washington statute and presents no constitutionally impermissible invasion of parental authority. Furthermore, when the grandparenting time provision is read as part of the entire Child Custody Act, the other provisions of the statute provide clear guidance to the trial courts in determining whether to grant a request for grandparenting time, including a deference to the decisions of the parents

Argument A:

Troxel and Subsequent State High Court Decisions: Following the United States Supreme Court Decision in ***Troxel v Granville, 530 US 57, 120 S Ct 2054, 147 L Ed 2d 49 (2000)***, many states have had an opportunity to review their non-parental visitation statutes in light of the ***Troxel*** decision. These decisions from other jurisdictions fall into three categories: (1) states that found their statute constitutional; (2) states that found their statute unconstitutional as applied to the facts of the specific case; and (3) states that found their

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RICHARD S. VICTOR, PLLC
100 WEST LONG LAKE ROAD • SUITE 250 • BLOOMFIELD HILLS, MI 48304 • TELEPHONE (248) 646-7177 • FACSIMILE (248) 646-9722

statute unconstitutional on its face.

Since the ***Troxel*** decision, state supreme or appellate state courts, including those in Alabama, Arizona, California, Colorado, Illinois, Indiana, Kansas, Louisiana, Maine, Mississippi, Maryland, Massachusetts, Missouri, New Jersey, New York, Ohio, Oregon, Texas, West Virginia, and Wisconsin, have held their respective grandparent visitation statutes to be constitutionally sound. They have done so because the statutes in these states are fundamentally different from the statute rejected in ***Troxel***. For example, Missouri's Supreme Court held that their statute, "avoids the sweeping breadth of the Washington statute in many ways. For example, in contrast to the Washington statute at issue in ***Troxel*** which allows visitation to any non-custodial person, Missouri limits visitation to the grandparents of a child. Consequently, the statute does not create the potential of subjecting parents' "every decision to review at the behest of endless third parties"***Blakely v Blakely, 83 SW 3d 537 at 544 (2002).***

Since so much weight appears to be placed on what the Supreme Court actually did hold in the ***Troxel*** case, appellant believes it most appropriate to review the plurality opinion of the Supreme Court in ***Troxel*** in order to fully understand the court's holding. Since this was a plurality opinion, we may find guidance in all six (6) Opinions and their respective holdings in this plurality decision. **Justice O'Connor**, writing on behalf of Chief Justice Rehnquist, Justice Ginsburg, and Justice Breyer, clearly set forth in her Opinion that the State of Washington had two third party non-parental visitation statutes, to wit.: Wash. Rev. Code § 26.09.240 and 26.10.160(3). The first is known as their Grandparent Visitation Statute.

LAW OFFICES OF
RICHARD S. VICTOR, PLLC
100 WEST LONG LAKE ROAD • SUITE 250 • BLOOMFIELD HILLS, MI 48304 • TELEPHONE (248) 646-7177 • FACSIMILE (248) 646-9722

Their second is a broad non-parental visitation statute that encompasses "any person at anytime". At page 2 of Justice O'Connor's Opinion, she clearly sets forth:

> Only the later statute is at issue in this case. Section 26.10.160(3) provides:
>
> > Any person may petition the court for visitation rights at anytime including, but not limited to, custody proceedings. The court may order visitation rights for any person when visitation may serve the best interest of the child whether or not there has been any change of circumstances. ***530 US 57, at 58***

Washington State's grandparent visitation law § 26.09.240, is similar to Michigan's statute in that it does not provide grandparent visitation rights when it involves children born out of wedlock. Since the *Troxel v Granville* case involved children who were born out of wedlock, the *Troxel* grandparents had to file under the "breathtakingly broad," "any person at anytime" statute. This is important for the reason that the ultimate decision of the U.S. Supreme Court in *Troxel v Granville* only ruled on this latter statute and did not rule on the constitutionality of the State of Washington's grandparent visitation law. In fact, that law still exists today and is available for grandparents who find themselves in situations where they need to file actions for grandparent visitation. When the Michigan Court of Appeals in the Derose majority opinion stated that:

> Simply put, if a judge in Washington cannot constitutionally be vested with the discretion to grant visitation to a non-parent based upon a finding that it is in the child's best interest to do so, then a Judge in Michigan cannot be obligated under statute to do so based upon the same finding. ***DeRose v DeRose, 249 Mich App 388, 394; 643 NW 2d 259, 263 (2002).***

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RICHARD S. VICTOR, PLLC
100 WEST LONG LAKE ROAD • SUITE 250 • BLOOMFIELD HILLS, MI 48304 • TELEPHONE (248) 646-7177 • FACSIMILE (248) 646-9722

The Court of Appeals 2-1 ***DeRose*** majority erred in its assumption that a grandparent in the State of Washington is unable to bring an action for grandparent visitation under the State of Washington law which is still in effect and was never challenged in the ***Troxel*** case.

Justice O'Connor's Opinion discussed the nationwide enactment of non-parental visitation statutes and set forth that these statutes were due, in some part, to the state's recognition of the changing realities of the American family. She states:

> States have sought to ensure the welfare of the children therein by protecting the relationships those children form with such third parties. The States' non-parental visitation statutes are further supported by a recognition, which varies from State to State, that children should have the opportunity to benefit from relationships with statutorily specified persons-for example, their grandparents. ***530 US 57, at 62, 63***

Further, Justice O'Connor's opinions clearly set forth the flaw in the Washington State law as:

> The problem here is not that the Washington Superior Court intervened but, that when it did so, it gave no special weight at all to *Granville's* determination of her daughter's best interest. ***530 US 57, at 67***

Thus, the U.S. Supreme Court did not hold that, on a whole, grandparents lack standing to bring their actions on constitutional grounds but, that the court should have given "special weight" to the parent's determination. This is re-emphasized in Justice O'Connors's Opinion when she writes:

> In an ideal world, parents might always seek to cultivate the bonds between grandparents and their grandchildren. Needless to say, however, our world is far from perfect, and in it the decision whether such an inter-generational relationship would be beneficial in any specific case **is for the parent to make in the first instance. And, if a fit parent's decision of the kind at issue here, becomes subject to judicial review, the court must accord at**

LAW OFFICES OF
RICHARD S. VICTOR, PLLC
100 WEST LONG LAKE ROAD • SUITE 250 • BLOOMFIELD HILLS, MI 48304 • TELEPHONE (248) 646-7177 • FACSIMILE (248) 646-9722

least some special weight to the parent's own determination. ***530 US 57, at 69*** (Emphasis added)

Justice O'Connor, speaking for four (4) of the justices, set forth that these third party visitation laws were not unconstitutional thereby precluding third parties from filing third party visitation requests. If so, why would Justice O'Connor's Opinion set forth that these decisions were "for the parent to make **in the first instance"** and then continue with the concept that if the decision by a fit parent becomes "subject to judicial review," the court must accord at least some special weight to the parents' own determination?" Obviously the United States Supreme Court in Justice O'Connor's Opinion contemplated that an action could be brought for "judicial review" if a decision was made to deny a grandparent visitation by a parent. The court clearly indicated that a shifting in priorities should take place and that the burden should not be on the parent to prove why the visitation should not occur (if objected to) but that the burden should be on the grandparent as the moving party to show why the visitation would be in the child's best interest. Further, if a dispute occurs, the court should accord "at least some special weight to the parent's own determination." Again, if the intent of the ***Troxel v Granville*** Supreme Court decision was to rule that all grandparent visitation laws were unconstitutional as a violation of the due process clause protecting the rights of "fit" parents to make decisions for and on behalf of their children, why would Justice O'Connor's Opinion discuss that if a dispute occurs and judicial review is involved, that these laws should be interpreted to provide "some special weight" by the court on what the parents of the child in question believe is best for their own child. Appellant submits that that is why Justice O'Connor's Opinion concludes (pp. 14-15) that

LAW OFFICES OF
RICHARD S. VICTOR, PLLC
100 WEST LONG LAKE ROAD • SUITE 250 • BLOOMFIELD HILLS, MI 48304 • TELEPHONE (248) 646-7177 • FACSIMILE (248) 646-9722

the Court's decision was limited to the "sweeping breadth of Section 26.10.160(3) of the Washington statutes (not their grandparent visitation statute) and that:

> Because much state court adjudication in this context occurs on a case by case basis, we would be hesitate to hold that specific non-parental visitation statute violate due process clause as a per se matter."

Justice O'Connor's Opinion goes on to then cite all fifty (50) state statutes, including MCLA 722.27(b) of the Michigan Statutes, specifically rejecting the request to hold all of these statutes as unconstitutional violations of the Due Process Clause of the Fourteenth Amendment.

Justice Souter, in his concurring Opinion reiterates that:

> I see no error in the second reason, that because the state statute authorizes any person at any time to request (or a judge to award) visitation rights, subject only to the State's particular best interests standard, the State's statute sweeps too broadly and is unconstitutional on its face. Consequently, there is no need to decide whether harm is required or to consider the precise scope of the parents' right or its necessary protections. (***Souter concurring Opinion at p. 2***)

He went on to say:

> [T]his for me is the end of the case. I would simply affirm the decision of the Supreme Court of Washington that it's statute, authorizing courts to grant visitation rights to any person at any time, is unconstitutional. (***Souter concurring Opinion at p. 5***)

Justice Stevens's dissent provides a full and complete analysis of this case. Clearly though, his opinion was that the U. S. Supreme Court should have denied ***certiorai*** and not even have heard the matter. His decision was based on the fact that the "any person at any time" statute was a bad law that needed to be redrafted. In fact, it is appellant's understanding that that specific statute had already been repealed by the Washington legislature at the time

LAW OFFICES OF
RICHARD S. VICTOR, PLLC
100 WEST LONG LAKE ROAD • SUITE 250 • BLOOMFIELD HILLS, MI 48304 • TELEPHONE (248) 646-7177 • FACSIMILE (248) 646-9722

this matter was heard by the U. S. Supreme Court. Their non-parental visitation statute currently in affect, is their grandparent visitation law (which still exists). However, Justice Stevens spent a great deal of time discussing the concepts of whether or not there needed to be a showing of actual or potential "harm" to a child before a court may order visitation over a fit parents' objection. Justice Stevens states:

> ...the Washington Supreme Court's holding-that the Federal Constitution requires a showing of actual or potential 'harm' to the child before a court may order visitation continued over a parents' objections-finds no support in this Court's case law. While, as the court recognizes, the Federal Constitution certainly protects the parent-child relationship from arbitrary impairment by the State, see infra, at 7-8, we have never held that the parents' liberty interest in this relationship is so inflexible as to establish a rigid constitutional shield, protecting every arbitrary parental decision from any challenge absent a threshold finding of harm. (***Steven's Opinion p. 6***).

Justice Stevens goes on to state:

> But even a fit parent is capable of treating a child like a mere possession. ... There is at a minimum a third individual, whose interests are implicated in every case to which the statute applies-the child. (***Steven's Opinion p. 7***)

Justice Stevens further sets forth:

> Our cases leave no doubt that parents have a fundamental liberty interest in caring for and guiding their children, and a corresponding privacy interest-absence exceptional circumstances-in doing so without the undo interference of strangers to them and to their child. Moreover, and critical in this case, our cases applying this principle have explained that with this constitutional liberty comes a presumption (albeit a rebuttable one) that natural bonds of affection lead parents to act in the best interest of their children.
>
> ...
>
> Despite this court's repeated recognition of these significant parental liberty interests, these interests have never been seemed to be without limits.
>
> ...
>
> **A parents' rights with respect to her child, have thus never been regarded as absolute**, but rather are limited by the existence of an actual, developed relationship with a child, and are tied to the presence or absence

LAW OFFICES OF
RICHARD S. VICTOR, PLLC
100 WEST LONG LAKE ROAD • SUITE 250 • BLOOMFIELD HILLS, MI 48304 • TELEPHONE (248) 646-7177 • FACSIMILE (248) 646-9722

> of some embodiment of family. These limitations have arisen, not simply out of the definition of parenthood itself, but because of this Court's assumption that a parent's interests in a child must be balanced against the State's long-recognized interests as *parens patriae,* (citations omitted) and critically, the child's own complementary interest in preserving relationships that serve her welfare and protection (citations omitted).
>
> While this court has not yet had occasion to elucidate the nature of a child's liberty interest in preserving established familiar or family-like bonds, 491, U.S., at 130 (reserving of a question), it seems to me extremely likely that, to the extent parents and families have fundamental liberty interests in preserving such intimate relationships, **so, too, do children have these interests, and so, too, must their interests be balanced in the question.** (***Stevens' Opinion pp. 7-9, emphasis added***).

Justice Stevens concludes by stating:

> **It seems clear to me that the Due Process Clause of the Fourteenth Amendment leaves room for states to consider the impact on a child of possible arbitrary parental decisions that never serve nor are motivated by the best interest of the child.** (***Steven's Opinion p. 12, emphasis added.***)

Justice Kennedy, in his dissent, makes a point that appellant believes is most salient in this matter, namely, that it was an error for the state's Supreme Court in Washington to come to the conclusion that the best interest of the child standard is never appropriate in third party visitation cases. In fact, he clearly sets forth that the court should have had an opportunity to reconsider the case and he would have remanded the case to the state court for further proceedings. He wrote:

> If it then found the statute has been applied in an unconstitutional manner because the best interest of the child standard gives insufficient protection to a parent under the circumstances of this case, or if it again declared the statute a nullity because the statute seems to allow any person at all to seek visitation at any time, the decision would present other issues which may or may not warrant further review in this court. ***(Kennedy Opinion p. 2)***

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RICHARD S. VICTOR, PLLC
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In the DeRose matter, there was no best interest hearing held by the court. Therefore, at the very least, this matter should be remanded for such an evidentiary hearing utilizing the best interest factors found at MCL 722.23 (part of the Child Custody Act of which MCL 722.27(b) is part of) providing special weight to the parent's determination that she believes that the visitation requested by appellant herein is not in her child's best interest.

Justice Kennedy goes on to state:

> To say that third parties have had no historical right to petition for visitation does not necessarily imply, as the Supreme Court of Washington concluded, that a parent has a constitution right to prevent visitation in all cases not involving harm.... **The State Supreme Court's conclusion that the constitution forbids the application of the best interest of the child's standard in any visitation proceeding, however, appears to rest upon assumptions the constitution does not require." *(Kennedy Opinion pp. 5-6, emphasis added.)***

Justice Kennedy also discusses the importance of familiar relationship to the individuals involved and to society and the importance of how this should be viewed through children as well as from the fact of blood relationships. (Kennedy Opinion p. 6). He further states:

> ...in certain circumstances where a child has enjoyed a substantial relationship with a third person, arbitrarily depriving the child of the relationship, could cause severe psychological harm to the child, In re: *Smith*, 137 Wash. 2d at 20, 969 P.2d at 30; and harm to the adult may also ensue. ***(Kennedy Opinion p. 7)***

Justice Kennedy goes on to discuss that since 1965, all fifty (50) states have enacted third party visitation statutes in some form or another and that each of these statutes, save one, permits a court to order visitation in certain cases if visitation is found to be in the best interest of the child ***(p. 7 Kennedy Opinion)***. Justice Kennedy then states:

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> The protection the constitution requires, then, must be elaborated with care, using the discipline and instruction of the case law system. We must keep in mind that family courts in the fifty (50) states confront these factual variations each day, and are best situated to consider the unpredictable, yet inevitable, issues that arise. ***(Kennedy Opinion pp. 8-9).***

Justice Kennedy concludes, that in his view, the decision under review should be vacated and the case remanded for further proceedings allowing the best interest hearing to take place utilizing the best interest factors as the standard to be applied in the State of Washington.

Justice Scalia in his Opinion is most instructive. Justice Scalia states:

> Only three (3) holdings of this Court rest in whole or in part upon a substantive constitutional right of parents to direct the upbringing of their children-two of them from an era rich in substantive due process holdings that have since been repudiated. (citations omitted) The sheer diversity of today's opinions persuades me that the theory of unenumerated parental rights underlying these three cases has small claim to *stare decisis* protection. ... While I would not now overrule those earlier cases (that has not been urged), neither would I extend the theory upon which they rested to this new context. ***(Scalia Opinion pp. 1-2)***

Appellant here requests this court to take instruction from Justice Scalia's Opinion. He clearly sets forth:

> **Judicial vindication of 'parental rights' under a Constitution that does not even mention them** requires (as Justice Kennedy's Opinion rightly points out) not only a judicially crafted definition of parents, but also-unless, **as no one believes**, the parental rights are to be absolute-judicially approved assessments of 'harm to the child' as judicially defined gradations of other persons (grandparents, extended family, adopted family in an adoption later found to be invalid, long term guardians, etc.) who may have some claim against the wishes of the parents. If we embrace this unenumerated right, I think it obvious-whether we affirm or reverse the judgment here, or remand as Justice Stevens or Justice Kennedy would do-that we will be ushering in a new regime of judicially prescribed, and federally prescribed, family law. **I have no reason to believe that federal judges will be better at this than**

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> **State legislatures; and State legislatures have the great advantage of doing harm in a more circumscribed area, of being able to correct their mistakes in a flash, and of being removal by the people.** ***(Justice Scalia's Opinion pp. 2-3, emphasis added).***

Appellant herein believes that the Court of Appeals in this matter should not have usurped the authority of the legislative branch in ruling that the 20 year old Grandparent Visitation Statute was unconstitutional. The Michigan legislature has the right to pass laws affecting its citizens. The issue of grandparent visitation is contained within the Michigan Child Custody Act. As set forth within this Brief, it is clear that the Act must be read as a whole. As part of the Act, MCL 722.23 sets forth the specific standards "best interest of the child" which a Court must utilize when a grandparent visitation request is made. Further, MCL 722.25 provides that if a dispute occurs between a parent and a third party, the parent should prevail unless the contrary is established by clear and convincing evidence. Even though this specific statute pertains to the issue of custody, ***Stevenson v Stevenson 74 Mich App 656; 254 NW2d 337 (1977)***, sets forth:

> Since 1971, the Child Custody Act, (citation omitted) has governed disputes over child visitation. While the Act focuses on custody disputes, there can be little doubt that the Act was intended to control visitation privileges as well. ***Stevenson, at 338***

Considering the long established and undisputed judicial premise, that courts must do everything possible to maintain the constitutionality of legislation passed by state legislatures, this Court may utilize the Child Custody Act and the legislative intent in creating said Act, to provide direction for Trial Courts when deciding grandparent visitation cases. Grandparents have the burden to show that their request is in the child's best interest.

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The twelve (12) factors of the Child Custody Act defining best interests are the guidelines for the court to follow in making its decision whether to grant such a request or deny same. Lastly, if a dispute occurs, the Court must provide "special weight" to the preference of the parent and the burden shall be on the grandparent to rebut/refute the parents' determination. Lastly, the Court should be mindful of not only the rights of the parent, but also the rights of the child in being able to maintain and continue a relationship with their family.

In ***Rideout v Riendeau, 761 A2d 291 (Me 2000)***, the Supreme Judicial Court of Maine held that Maine's Grandparent Visitation Act, as applied to the facts presented "is narrowly tailored to serve a compelling state interest, and thus does not violate the due process clause of the 14th Amendment of the United States Constitution." ***Id, at 294***. The Court found that Maine's Act was significantly narrower than the Washington statute challenged in ***Troxel***. The Court noted that the United States Supreme Court in ***Troxel*** left "for another day a constitutional analysis of statutes with more carefully established protections of parents' fundamental rights." ***Rideout, 761 A2d at 297***. Maine's statute allows grandparents to seek an order for visitation if they can show: "(1) The death of one of the parents; (2) A sufficient existing relationship with their grandchildren; or (3) a sufficient effort to sustain a relationship." ***Id, at 298.*** Additionally, the act set forth additional factors to be weighed by the trial court in determining the best interests of the children. ***Id, at 298, n 10.*** The Court noted:

> The constitutional liberty interest in family integrity is not, however, absolute nor forever free from state interference. The due process clause is not an impenetrable wall behind which parents may shield their children; rather it provides heightened protection against state intervention in parent's

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> fundamental right to make decisions concerning the care, custody, and control of their children.

Id, at 299. Maine's statute contains fewer "best interests" factors than does the Michigan statute. Our statute utilizes twelve specific best interest factors to be considered in custody, parenting time, and grandparenting time disputes. ***MCL 722.23.***

The Missouri Court of Appeals came to a similar conclusion ***In Re GPC, 28 SW3d 357 (Mo App E.D., August 8, 2000)***. The Missouri Court found their statute to be narrower than the statute ruled on in ***Troxel***, noting that it "provides much greater protection of parents' decision than does the Washington statute because under Section 452.402.1(3) the denial must both be unreasonable and have continued for at least ninety (90) days before grandparents may file an action seeking visitation." ***Id. at 364.*** The Missouri Court further distinguished ***Troxel*** by noting that its statute requires the appointment of a guardian ad litem, adding another voice to the trial court's best interests determination. Although permissive rather than mandatory, the Michigan statute does provide for appointment of a guardian ad litem. ***MCL 722.22(d); 722.24(2)***.

In a more recent Missouri Court of Appeals case, ***McRaven v Thomsen 55 SW3d 419 (Mo App 2001)***, the paternal grandparents petitioned for grandparent visitation. The Circuit Court entered an interlocutory order granting temporary visitation pending completion of trial on the merits. The parents appealed the interlocutory order. The Court of Appeals held that in the absence of exigent circumstances and given the fundamental nature of parents' rights to rear their children, the trial Court abused it's discretion in ordering grandparent visitation before conducting a full hearing. Far from holding grandparent visitation unconstitutional,

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the Court of Appeals held "under the circumstances presented, the trial Court clearly abused it's discretion in ordering temporary grandparent visitation without affording parents the right to a full and fair opportunity to present their case." The Court went on to note that the Missouri Supreme Court has upheld the constitutionality of Missouri's grandparent visitation statute in ***Herndon v Tuhey, 857 SW2d 203 (Mo. banc 1993)***. See also ***Cabral v Cabral 28 SW3d 357 (Mo. App. 2000)*** *(distinguishing* ***Troxel*** *and following* ***Herndon)*.

Therefore, following the ***Troxel*** decision the Missouri appellate courts have held that their statute is constitutional and, in a dispute, a hearing must be granted to afford parents the opportunity to present their case prior to the entry of an order for grandparent visitation. It should be noted that when ***McRaven*** was decided, the Missouri Court of Appeals was fully aware of the ***Troxel*** decision. Rather than finding that ***Troxel*** mandated a finding that their statute was unconstitutional, they remanded to the trial court for a full hearing on merits.

In several Texas Court of Appeals decisions after ***Troxel***, the Texas grandparent visitation statute was also held constitutional. In ***Lilley v Lilley 43 SW3d 703 (Tex Civ App 2001)***, a paternal grandfather sought an order for visitation with the child following the suicide of the child's father. The trial court ordered visitation with the paternal grandfather. The child's mother appealed. The Court of Appeals held:

> (1) evidence was sufficient to support the trial court's order allowing paternal grandparent visitation with the child and; (2) grandparent visitation statute did not violate the mother's due process rights, and thus the order granting paternal grandfather visitation with the child was held to be constitutional.

The Court noted that the facts of ***Troxel*** and ***Lilley*** cases were similar. Both involved grandparents petitioning for visitation of the children after the fathers of the grandchildren

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committed suicide. However, the Court distinguished the statutes being challenged in the two cases. The ***Lilley*** court held at ***43 SW3d 711*** that the United States Supreme Court in ***Troxel*** "did not address whether a non-parental visitation statute must require a showing of harm or a potential harm to the child before granting visitation. Instead, noting that "much state court adjudication in this context occurs on a case-by-case basis," the Court emphasized that it was ruling on "the sweeping breadth" of the Washington Statute and its application to the specific facts at hand...."

Distinguishing its statute from the very broad statute challenged in ***Troxel***, the ***Lilly*** court said at ***43 SW3d 712***: "Section 153.433 of the Texas Family Code is not "breathtakingly broad," as was the Washington statute in ***Troxel***.... Section 153.433 allows only grandparents, under particular circumstances, to petition for access to a child, provided it is in the child's best interests." The ***Lilley*** court went on to hold that the Texas grandparent visitation statute (§153.433) had already been examined and held to be constitutional in several other Texas appellate decisions. (See ***Deweese v Crawford 520 SW2d 522, 526 (Tex Civ App 1975) overruled on other grounds by Cherne Indus, Inc v Magallanes, 763 SW2d 768, 772 (Tex 1989)***. ("The state has sufficient interest in the family relationship to permit legislation in this area."). The ***Lilley*** court concluded with the statement:

> The Texas statute is not unconstitutional on its face or in the district court's application to the facts at hand.

Id, at 43 SW3d 713.

Most state appellate courts addressing the constitutionality of grandparent visitation statutes post-***Troxel*** have upheld those statutes. For example, on February 25, 2002, in the

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RICHARD S. VICTOR, PLLC
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Supreme Court, Appellate Division, 2nd Department, New York, in the matter of ***Hertz v Hertz, 2001 WL 1794631 (2002)*** it was held:

> At issue on this appeal is whether Domestic Relations Law § 72, New York's grandparental visitation statute is unconstitutional on its face in light of the decision of the United States Supreme Court in ***Troxel v Granville*** (citation omitted). We conclude that the statute is not facially invalid.
>
> The court's analysis in the ***Hertz, supra*** case, went on to state:
>
> Contrary to the parents' contention in this case, ***Troxel*** does not mandate a finding that Domestic Relations Law § 72 is unconstitutional per say (see matter of ***Morgan v Grzesik, 280 AD 2d 150, 732 NYS 2d 773***). 'A facial challenge to a legislative act is.... the most difficult challenge to mount successfully since the challenger must establish that no set of circumstances exists under which the act would be valid.' (***United Stated v Salerno, 481 U.S. 739, 745, 107 S.Ct.2095, 95 L.Ed.2d 697***). The fact that a statute might operate unconstitutionally under some circumstances is insufficient to render it entirely invalid (see ***United States v Salerno, Supra at 745, 107 S.Ct. 2095***). Legislative enactments are presumptively valid and a party challenging a statute must demonstrate its invalidity beyond a reasonable doubt (see matter of ***Van Berkel v Power, 16 NY 2d 37, 40; 261 NYS 2d 876, 209; NE2d 539; McKinney's v Cons. Laws of N.Y., Book 1, Statutes Section 150)***. The burden was not met in this case.

Factually, ***Hertz*** was a case where a grandfather commenced proceedings under New York's Domestic Relations Law to obtain visitation with his minor grandchildren. The parents moved to dismiss the case. The Supreme Court granted their motion determining that the statute was unconstitutional on its face. The grandfather appealed. The appellate court reversed holding that the New York grandparent visitation statute was not facially invalid and therefore not unconstitutional:

> Consequently, the Supreme Court erred in concluding that Domestic Relations Law § 72 is unconstitutional per say and in dismissing the petition on that ground. We note that the parents' motion raised only the issue of whether Domestic Relations Law § 72 is facially invalid under ***Troxel***. In

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> determining that it is not, we express no opinion with respect to the application of the statute to the facts of this case.

Hertz, supra. Therefore, the matter was reversed and remanded for a hearing utilizing New York's grandparent visitation statute, similar to Michigan's, to determine what would be in the best interests of the minor grandchildren.

In ***Morgan v Grezesik, 732 NYS2d 773 (2001),*** a grandmother brought an action seeking visitation with her grandchildren over opposition of the children's parents. The New York Family Court granted visitation. On appeal, the New York Supreme Court, Appellate Division, held that the parents' due process right to make decisions regarding their children was not violated by issuance of an order granting the grandmother visitation. Again, the Appellate Division held:

> Contrary to respondents' contentions, we conclude that *Troxel* does not call into question the facial validity of Domestic Relations Law § 72 and that the application of the Domestic Relations Law § 72 to this case does not violate respondents' rights under the due process clause.
>
> ***
>
> ...Domestic Relations Law § 72 provides in relevant part:
>
> > Where either or both of the parents of a minor child, residing within this state, is or are deceased, or where circumstances show that conditions exist which equity would see fit to intervene, a grandparent or the grandparents of such child may apply... to the family court... and ...the court, by order after due notice to the parent or other person or party having the care, custody, and control of such child, ... may make such directions as the best interests of the child may require, for visitation rights for such grandparent or grandparents in respect to such child.

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> Respondents contend that, in light of ***Troxel*** [citation omitted] the statute is unconstitutional on its face. We disagree.

Morgan, supra.

In its analysis, the Appellate Division distinguished the New York grandparent visitation statute from the "overly broad" statute which was challenged in ***Troxel***. In fact, despite the erroneous statement in the Michigan Court of Appeals opinion in the instant case, the New York court recognized that the statute challenged in ***Troxel*** was not the Washington grandparent visitation statute. The Washington grandparent visitation statute found at Section 26.09.240 of the Washington code permits grandparents to file a request to see their grandchildren only if there has been a death of a parent or a divorce. Children born out of wedlock are not covered pursuant to that statute for grandparent visitation. This statute was not invalidated by ***Troxel*** and remains viable and constitutional in Washington.

In ***Troxel***, because the children were born out of wedlock, the ***Troxel*** grandparents could not file their request for grandparent visitation under Washington's limited grandparent visitation statute. (26.09.240). Instead, they were forced to file under a general "non-parental visitation statute" found at Section 26.10.160. That very broad statute granted legal standing for visitation to "any person at any time."

The holding in ***Troxel*** distinguishes the vast majority of state grandparent visitation laws (most of which have been deemed constitutional because of their limited scope like that found in Michigan's statute) from Washington's overly broad general third-party visitation statute. Returning to the New York decision in ***Morgan, supra,*** it was held:

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> Domestic Relations Law § 72 is more narrowly drawn than the Washington statute. In contrast to the Washington statute, Domestic Relations Law § 72 is limited to grandparents. Additionally, the standing of grandparents is not automatic unless either or both of the parents of the grandchild had died. 'In all other circumstances, grandparents will have standing only if they can establish circumstances of which equity would see fit to intervene.' (Matter of ***Emanuel S. v Joseph E., 78 NY2d 178, 181; 573 NYS.2d 36; 577 NE2d 27)***.
>
> The ***Morgan*** court held:
>
> In deciding that threshold question, the court is required to examine all the relevant facts, including the nature and basis of the parents' objection to visitation and the nature and extent of the grandparent-grandchild relationship.

The ***Morgan*** court then went on to declare that the New York Grandparent Visitation statute was not unconstitutional.

Michigan Law clearly states that before rendering a specific statute written and passed by the Legislature unconstitutional, the court must read the act as a whole. ***Taylor v Gate Pharmaceuticals, 248 Mich App 472, 478; 639 NW 2d 45 (2001)*** Michigan's Child Custody Act is found at MCL 722.21 et seq. Michigan's grandparent visitation statute (MCL 722.27b) is an integral part of the Child Custody Act, found at §7b of the larger statute. Whether or not this Act should be read as a whole is well settled Michigan law.

"The criteria this Court has utilized in evaluating legislative standards are set forth in ***Dep't of Natural Resources v Seaman, 396 Mich 299, 309; 240 NW2d 206 (1976)***: 1) the act must be read as a whole; 2) the act carries a presumption of constitutionality; and 3) the standards must be as reasonably precise as the subject matter requires or permits." ***Taylor, at 479***.

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Included within the Act's provisions is MCL 722.24(2):

> If, at any time in the proceeding, the court determines that the child's best interests are inadequately represented, the court may appoint a lawyer - guardian ad litem to represent the child. A lawyer - guardian ad litem represents the child and has powers and duties in relation to that representation as set forth in § 17d of Chapter XIIA of 1939 PA288, MCL 712A.17d.

In addition, our statute contains the necessary presumptions when there is a dispute between a parent and a third person, as mandated by the Supreme Court in ***Troxel.*** MCL 722.25 clearly states that if a dispute is between the parents or between third persons, the best interests of the child control. The statute goes on to say that the court will presume that the best interests of a child are served by awarding custody to the parent or parents, unless the contrary is established by clear and convincing evidence. Because this language is found within the larger Child Custody Act; its terms apply to all disputes under the statute, including those involving grandparent visitation. This Court should therefore apply the intent of the legislature to give high deference to the rights and wishes of parents when a dispute occurs between parents and a third party, such as a grandparent in a grandparent visitation dispute when it reads the Act as a whole. With that deference an integral part of the statute, there is no basis for a constitutional challenge to the law.

This concept has been upheld in the Court of Appeals of Wisconsin in the matter of ***In re the Paternity of Roger D H v Virginia O., 2002 WL 59233 (Wis App, January 17, 2002)***. In ***Roger D H***, the mother argued that ***Troxel*** makes it clear that a statute that fails to expressly include a deference to a parent's decision making does not meet the constitutional safeguards of the 14th Amendment. Her argument amounted to an assertion that

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Wisconsin statute (§ 767.245) was facially unconstitutional under ***Troxel*** because the statute does not require that courts give presumptive weight to a fit parent's decision regarding non-parental visitation. However, while ***Troxel*** does require that courts recognize a presumption that fit parents act in the best interests of their children, it provides no support for the claim that a statute without an expressed presumption is facially unconstitutional. To the contrary, ***Troxel*** strongly suggests that courts may read such a requirement into the statute to save it from facial invalidation. ***Roger D H, at 758***.

The Wisconsin Court of Appeals went on to distinguish the ***Troxel*** matter and stated:

> Despite these observations and conclusions, and despite the fact that the Washington statute had no language suggesting that courts should give weight to a fit parent's decision, the United States Supreme Court did not find the Washington statute facially unconstitutional. Instead, the ***Troxel*** court opted to find the particular application of the statute unconstitutional because the trial court acted on a 'slender findings' and because it used an impermissible presumption. Rather than give the required presumptive weight to the parent's decision, the Washington trial court improperly presumed that grandparent visitation was in the best interests of the children.
>
> ***
>
> ...We glean from ***Troxel*** two propositions relevant to the issue before us. First, due process requires that courts apply a presumption that a fit parent's decision regarding non-parental visitation is in the best interests of a child. Second, a state court may read this requirement into a non-parental visitation statute, **even when the statute is silent on the topic.** [Emphasis added].
>
> Accordingly, we hold that when applying Wisconsin statute § 767.245(3), circuit court's must apply the presumption that a fit parent's decision regarding grandparent visitation is in the best interests of a child. At the same time, we observe that this is only a presumption and the circuit court is still obligated to make its own assessment of the best interests of the child. See § 767.245(3)(f). What the due process clause does not tolerate a court giving no 'special weight' to a fit parent's determination but instead basing its decision on 'mere disagreement' with the parent. Troxel 530 U.S. at 68-69.

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Roger DH, at 758.

Unlike the Michigan Court of Appeals in the instant case, the Wisconsin Court of Appeals in ***Roger D H*** followed the well-established rule favoring construction of statutes in a way that avoids invading the province of the legislative branch and upholds laws that are challenged constitutionally. Other state appellate courts have done what the Michigan Court of Appeals failed to do.

The Supreme Court of Georgia, in ***Clark v Wade, 544 SE2d 99 (Ga 2001)***, held:

> Our judicial responsibility requires us to consider the legislature's intent in enacting the law and to construe the statute to give effect to that intent when possible. This role means that we must give a narrowing construction to a statute when possible to save it from constitutional challenge, ***at 27***.

In ***Ex parte DW and JCW, (Unpublished) 2002 W.L. 193868 (February 8, 2002)***, a maternal grandmother petitioned for grandparent visitation with her granddaughter who had been legally adopted by her paternal grandparents. The trial court awarded her grandparent visitation rights. The adoptive parents appealed. The Court of Civil Appeals reversed, finding that the statute providing for natural grandparent visitation of an adoptee grandchild to be unconstitutional. The Alabama Supreme Court granted leave to appeal and, as a matter of first impression in that state, held that the Legislature had the power to qualify rights of adopting parents by enacting statutes allowing natural grandparents of an adoptee to petition for post-adoption visitation rights in the context of intrafamily adoptions. The adoptive parents relied upon ***Troxel*** in support of their request to hold the Alabama grandparent visitation statute (§ 26-10A-30) unconstitutional.

In its decision, the Supreme Court of Alabama stated:

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> In considering the constitutionality of § 26-10A-30, we must remember that it is well established that this court should be very reluctant to hold any act unconstitutional. [citation omitted.]
>
> The court went on to state:
>
> In construing a statute, the first rule is that the intent of the Legislature should be effectuated. [citation omitted.] We must consider it as a whole and must construe [the statute] reasonably so as to harmonize all of its provisions. [citation omitted.]
>
> It was the clear intent of the Legislature in enacting § 26-10A-30 [grandparent visitation statute] to give the trial court the authority to grant post adoption visitation rights to the natural grandparents of the adoptee, when the adoptee is adopted by a family member. The only reasonable conclusion is that the Legislature intended to limit the rights of the adopting parents by allowing the possibility of court ordered grandparent visitation over the objections of the adopting parents. Any other conclusion which failed to give an effect to § 26-10A-30, in violation of this court's duty to harmonize the statutory provision in order to give effect to all parts of the statute. ***Ex parte DW and JCW, at 3***.

The Supreme Court of Appeals in West Virginia in ***State of West Virginia ex rel. Brandon L. and Carol Jo L v Moats, 551 SE2d 674 (W Va 2001)*** held that the West Virginia grandparent visitation act (West Virginia Code § 48-2B-1-12 (1998)) by its terms did not violate the substantive due process right of liberty extended to a parent in connection with his/her right to exercise care, custody and control over his/her child(ren) without undue interference from the state.

The Court of Appeals of Louisiana in ***Galjour v Harris, 795 So2d 350 (La App 2001)*** also addressed a parent's contention that the grandparent visitation statute was unconstitutional in a case where a brother, sister-in-law, and maternal grandparents of a deceased mother sued the father for visitation of a minor child. In that case, the court denied

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the brother and sister-in-law visitation, but granted visitation to the maternal grandparents. All of the parties appealed. The appellate court held: (1) the civil code did not allow a brother and sister-in-law to seek court-ordered visitation; (2) the statute allowing grandparents visitation of grandchildren in limited situations was constitutional; and (3) the trial court's grant of visitation to grandparents was not an abuse of discretion.

The parent in ***Galjour*** argued that the Louisiana grandparent visitation statute (R.S. 9:344A) was unconstitutional under both the United States, and Louisiana Constitutions, because it impermissibly infringed upon a parent's liberty interest in raising children without interference from third parties. The parent cited ***Troxel*** in support of his position. However, the Louisiana appellate court disagreed. As has become the prevailing pattern, that court distinguished ***Troxel*** by holding:

> Jeffrey [parent] argues the holding of *Troxel* should be applied here. We disagree. First, unlike the Washington statute determined to have been unconstitutional in *Troxel*, Louisiana's statute La. R.S. 9:344 is more narrowly drawn. The Louisiana legislature has determined that in specified, limited situations, i.e., where one parent dies, is interdicted, or incarcerated, the *parents* of the deceased, interdicted, or incarcerated party *may* have *reasonable* visitation rights with the children *provided* the court finds said visitation to be in the best interest of the child. Unlike the Washington statute, the Louisiana legislature expressly limited the scope of La. R.S. 9:344 to the parents of the deceased or absent parent. Additionally, the statute's grant of visitation does not contemplate a significant intrusion upon the child's relationship with the other parent or interference with said parent's fundamental right to make child-rearing decisions. ***Galjour, at 358.***

In ***Stacy v Ross, 798 So2d 1275 (Miss 2001)*** maternal grandparents brought an action against the custodial parents, whose marriage was intact, seeking visitation with their grandson. The trial court entered a grandparent visitation order and, subsequently, held the

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parents in contempt for denying the grandparents their court-ordered visitation. The parents appealed the visitation and contempt orders. On appeal, the Supreme Court of Mississippi held that their grandparent visitation statute did not violate the parents' due process rights. The statute contained limitations permitting the state courts to grant visitation to grandparents upon a finding that the grandparent has established a viable relationship with the grandchild, that the custodial parents have unreasonably denied grandparent visitation, and that the visitation between the grandparent and the grandchild would be in the best interests of the child. Michigan's grandparent visitation statute is not as broad in scope as that which was upheld by the Supreme Court of Mississippi in that Michigan does not permit grandparent visitation proceedings where there is an intact family.

The Supreme Court of Mississippi, in distinguishing ***Troxel***, clearly delineated the difference between the overly broad "any person at any time" law which was unconstitutionally applied to the facts of the Washington case from the more circumscribed Mississippi grandparent visitation statute:

> Unlike the 'breathtakingly broad' 'any person' language in Washington's statute, as characterized by Justice O'Connor writing for the majority in ***Troxel*** [citation omitted], Mississippi Grandparents' Visitation Act expressly permits state courts to grant visitation to grandparents. But before doing so, the court must find that (1) the grandparent has established a viable relationship with the grandchild, (2) that the custodial parents have unreasonably denied grandparent visitation, and (3) visitation between the grandparent and the grandchild would be in the best interests of the child. *Miss. Code Ann. § 93-16-1(2).* The Washington statute did not enumerate the same or even similar limitations and, significantly, the Supreme Court distinguished Mississippi as being among those states which expressly provide limitations (that Mississippi courts may not award visitation unless a parent has unreasonably denied visitation). Troxel, *120 S.Ct. at 2062. See also* Zeman *v* Stanford, *789 So.2d at 803* (the limitations imposed by this

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RICHARD S. VICTOR, PLLC
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> Court in its interpretation of § 93-16-3 clearly result in the "narrower reading" lacking in Troxel). The Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions as to care, custody, and control of their children. Troxel, 120 S.Ct. at 2060. This right, however, is not absolute, **Stacy, at 1279.** *[Emphasis added].*

The unique framing of the statute at issue in **Troxel** from typical state grandparent visitation laws was also the key factor in a case holding Ohio's grandparent visitation statute constitutional. ***Fischer v Wright (Unpublished) (2001 WL 1538495 (Ohio App. 5 Dist.) November 30, 2001).*** The Ohio Court of Appeals held:

> The Second Assignment of Error expressed in Case No. 01-CA-003 argues that the trial court's ruling under Civ.R. 12(C) in dismissing the declaratory judgment action was an error. There are two prongs contained in such complaint to wit: (a) constitutionality of R.C.§ 3109.051B constitutional application thereof. As this court in Epps v Epps *(August 9, 2001)* and this opinion as stated heretofore have found such statute to be facially constitutional, we find that the trial court was correct in such decision. This ruling would be in accordance with prior decisions in State ex. rel. Dickman v Defenbacher *(1955), 164 Ohio St. 142: ...* A regularly enacted statute is presumed to be constitutional, **Fischer, (Unpublished) at 5.**

In her opinion concurring in part and dissenting in part, Justice Edwards concurred with the majority that the plurality decision in **Troxel** does not mandate a finding that O.R.C. 3109.051(B) unconstitutional on its face, even though R.C. 3109.051(B) contains no expressed presumption that a fit parent's decision regarding third party visitation is in a child's best interests. Justice Edwards wrote:

> I concur with the majority that the plurality decision in Troxel v Granville *(2000), 530 U.S. 57,* does not require us to find *O.R.C. 3109.051(B)* unconstitutional on its face even though *R.C. 3109.051(B)* contains no presumption that a fit parent's decision regarding third-party visitation is in a child's best interests. The plurality in Troxel indicated that '...the

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RICHARD S. VICTOR, PLLC
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> constitutionality of any standard for awarding visitation turns on the specific manner in which the standard is applied...' Therefore, the direction given to us by the plurality in Troxel is to look at whether the application of the visitation statute to the facts is constitutional. I also concur with the majority that the application of O.R.C. 3109.051(B) is constitutional in the case sub judice."

Fischer, supra (Edwards concurring in part and dissenting in part, at 2).

After ***Troxel***, The Court of Appeals of Oregon applied the best interests of the child standard and rejected a constitutional challenge to Oregon's grandparent visitation statute. ***In the Matter of the Marriage of Billy Sisson, 13 P3d 152 (Ore App 2000)***. A grandparent visitation request was denied, but not based on any alleged constitutional infirmity in the statute. Rather, the court felt that grandparent visitation was not in the child's best interests on the facts presented. If this Court reverses the Court of Appeals in the instant case, trial courts will retain the option of denying grandparent visitation requests based on a particular child's best interests. No grandparent visitation request can be considered automatic.

The Supreme Court of Kansas in ***Skov v Wicker, 32 P3d 1122 (Kan 2001)***, held: (1) [T]he statute providing that grandparents and stepparents may be granted visitation rights can be harmonized and construed as constitutionally valid; and (2) [G]reat-grandparents are not included within the term "grandparents" in child visitation statutes. A grandparent visitation request was filed by both the grandparent and the great-grandparent of the child. Following a full analysis of Kansas law, the ***Skov*** court held:

> We presume that a statute is constitutional and resolve doubts in favor of its validity. This court not only has the authority, but also the duty, to construe a statute in such a manner that it is constitutional if this can be done within the apparent intent of the legislature in passing the statute. State v Martinez, *268 Kan. 21, Syl. 2, 988 P.2d 735 (1999).*

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RICHARD S. VICTOR, PLLC
100 WEST LONG LAKE ROAD • SUITE 250 • BLOOMFIELD HILLS, MI 48304 • TELEPHONE (248) 646-7177 • FACSIMILE (248) 646-9722

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> This court has on previous occasions seen fit to construe and limit criminal statutes in such a way as to uphold their constitutionality by reading judicial requirements into statutes which otherwise were overbroad. *219 Kan. At 70, 547 P.2d 760.* Here, the intent of the legislature is to provide for grandparent visitation in divorce actions. We have the authority and duty to construe K.S.A.2000 Supp. 60- 1616(b) to carry out that intent in a constitutional manner.

Skov, at 1127.

The ***Skov*** court then went on to hold the Kansas statute to be constitutional as it applied to the grandparent but not as to the great-grandparent, who was not a named class of individuals within their state grandparent visitation statute.

In summary, the ***Troxel*** decision left much confusion as to the validity and constitutionality of individual grandparent visitation statutes around our country. However, a careful and concise reading of the United States Supreme Court decision clearly indicates that, although the Supreme Court had the opportunity to do so, it did not find individual state grandparent or non-parental visitation statutes to be facially unconstitutional. In fact, the plurality opinion by Justice O'Connor addressed and only interpreted one overly broad statute which permitted "any person at any time" without condition or restriction to seek court-ordered visitation with another person's child. Even faced with such a broad statute, the Court invalidated the law only "as applied."

Without restrictions similar to those included in the Michigan statute (i.e. divorce, legal separation, death of a parent, child placed out of the home of a parent, etc.) the United States Supreme Court in ***Troxel*** held that, as applied to the facts of ***Troxel*** only, the "any

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RICHARD S. VICTOR, PLLC
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person at any time" statute was unconstitutional. Washington's much more restrictive grandparent visitation statute was not ruled unconstitutional and remains intact today. The Michigan Court of Appeals majority in the instant case relied incorrectly on its mistaken belief that:

> Simply put, if a judge in Washington cannot constitutionally be vested with the discretion to grant visitation to a non-parent based upon a finding that it is in the child's best interests to do so, then a judge in Michigan cannot be obligated under statute to do so based upon the same finding, ***DeRose, at 643 NW2d 263***.

It is simply untrue that a judge in the state of Washington is denied the discretion to grant visitation to a grandparent based on a finding that it is in the child's best interests. That right still remains, following ***Troxel***, in the state of Washington as it does in states which include, but are not limited to: Alabama, California, Indiana, Kansas, Louisiana, Maine, Massachusetts, Mississippi, Missouri, New York, Ohio, Oregon, Texas, West Virginia, and Wisconsin. Most other states have not been called on to determine the constitutionality of their respective grandparent visitation statutes. But, when, and if they are, a careful reading of ***Troxel*** will not support a finding that their laws are unconstitutional per se.

That is not to say, however, that certain, poorly drafted statutes, should not have been held unconstitutional in their respective states. For example, the Supreme Court of the state of Illinois held their grandparent visitation statute unconstitutional per se. ***Wickham v. Byrne, 199 Ill2d 309, 769 NE2d 1 (April, 2002)***, which invalidated that state's grandparent visitation law. Their law is easily distinguished from Michigan's grandparent visitation statute, because of the way the Child Custody Act is drafted, compared to the Illinois statute.

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The fundamental due process safeguards that are absent from the Illinois statute are, undoubtedly present in Michigan's grandparent visitation statute. The Supreme Court of Massachusetts, quoting from the ***Troxel*** decision, on which the Illinois Court relied, stated:

> What clearly emerges from the plurality decision in ***Troxel***, with respect to due process, are the following principles:
>
> (i) reaffirmation that parent's liberty interest in child rearing is indeed fundamental, and is certainly fundamental in this context,
> (ii) any third party should not be permitted to seek visitation,
> (iii) in determining whether grandparent visitation should occur, there exists a presumption that a fit parent will act in the best interest of his or her child...and the decision of a fit parent concerning grandparent visitation is entitled to considerable deference, and
> (iv) in determining whether grandparent visitation should occur, the potential impact to the parent-child relationship should be considered.

Whereas, "section 607(b)(1) of the Illinois statute exposes the decision of a fit parent to the unfettered value judgement of a judge and the intrusive micro-managing of the state," ***Wickham v. Byrne,199 Ill2d 309, at 320***, Michigan's grandparent statute shields fit parents from such obtrusive state action. By providing for the necessary presumption within Michigan's Child Custody Act, the considerable deference requirement mandated by ***Troxel*** is fulfilled.

The Child Custody Act of Michigan states, "If the child custody dispute is between the parent or parents and an agency or a third person, the court shall presume that the best interests of the child are served by awarding custody to the parent or parents, unless the contrary is established by clear and convincing evidence." ***MCL 722.25(1)*** It is undisputed,

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therefore, that in the state of Michigan, the burden is on the third party to show that the presumption of awarding custody to the parent or parents is misplaced. Furthermore, the burden is high–that of clear and convincing evidence. Whether or not the terms, "custody" and "visitation" may be interchanged in this instance is clear: "While the [Child Custody] act focuses on custody disputes, there can be little doubt that the act was intended to control visitation privileges as well." ***Stevenson v. Stevenson, 254 NW2d 337, 338 (1977).***

Therefore, the Michigan statute, which clearly gives deference to a fit parent's decision, should not fall victim to the same fate of the Illinois statute, which lacked this necessary component. As long as this Court follows the well settled principles of statutory construction and interpretation, Michigan's grandparent statute should be held constitutional, and the Court of Appeals decision should be reversed. Those two principles are: 1. That statutes facing a constitutional challenge are presumed constitutional, and 2. State courts may read into their statutes the presumption that fit parents act in the best interests of their children in order to save those statutes from invalidation.

Furthermore, the Court of Appeals majority opinion in the instant case cannot be legally or logically reconciled with a prior published decision of that court authored by a well-respected jurist, the Hon. Hilda R. Gage. On October 23, 2001 (after the instant case was argued), another panel of the Court of Appeals (Judges Griffin, Gage, and Meter) held that even in cases where third parties challenge parents for custody of their children, the "best interests of the child" test remains constitutionally valid provided that a strong presumption is granted to the parents. ***Heltzel v Heltzel, 248 Mich App1; 638 NW2d 123(2001).*** After

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acknowledging that the Legislature had properly made the child's best interest (as defined in ***MCL 722.23***) the paramount legal test (citing ***Eldred v Ziny, 246 Mich App 142, 150; 631 NW2d 48 (2001)***), the ***Heltzel*** panel held at ***NW2d at 138***:

> We hold that, to properly recognize the fundamental constitutional nature of the parental liberty interest while at the same time maintaining the statutory focus on the decisive nature of an involved child's best interests, custody of a child should be awarded to a third-party custodian instead of the child's natural parent only when the third person proves that all relevant factors, including the existence of an established custodial environment and all legislatively mandated best interest concerns within § 3, taken together clearly and convincingly demonstrate that the child's best interests require placement with the third person.

If the "best interests of the child" legal standard, as defined in ***MCL 722.23***, is constitutionally adequate to serve as the legal standard for disputes between parents and third parties on matters concerning custody, it is logically and legally impossible for it to be constitutionally inadequate as a legal standard in the much more narrow and focused area of grandparent visitation. Stated plainly, the majority opinion in the instant case cannot be logically or legally reconciled with the well-reasoned opinion in ***Heltzel***. Under ***MCR 7.215(I)***, the Court of Appeals majority in the instant case should have found itself bound by ***Heltzel*** and refused to find the "best interests of the child" test unconstitutional per se. Instead, as in ***Heltzel***, the majority in the instant case should have endeavored to provide guidance to the trial court's in properly applying the existing statutory standard in a way that would not run afoul of fundamental constitutional rights.

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Argument B:

The Court of Appeals erred in finding that the "best interests of the child" legal standard provides inadequate guidance to the trial courts in ruling on motions/actions for grandparenting time.

At page 4 (slip opinion) of the Court of Appeals majority opinion in the instant case, the panel incorrectly states that Michigan's grandparent visitation statute fails to provide adequate guidance to our trial court's in determining whether grandparent visitation should be granted. In fact, the "best interests of the child" test used in the statute (and throughout the Child Custody Act of 1970, of which the grandparent visitation statute is Section 7b) is one of the most thoroughly and precisely defined legal standards in Michigan law, both by virtue of the very detailed definition contained in Section 3 of the Act (MCL 722.23) and the voluminous appellant case law further defining that standard.

Michigan case law has consistently held that it is not necessary for the grandparent visitation statute itself (MCL 722.27b) to include within its own subsection a substantive legal standard or expressly stated presumption when the necessary standard and presumption are already located within the same Act. As noted above, it is merely one part of an overall legislative scheme known as the Child Custody Act of 1970 (MCL 722.21 et seq). The Act as a whole addresses a full range of child-related issues including custody disputes between parents, custody disputes between parents and third parties, parenting time, and grandparent visitation (now known as grandparenting time). In each of these areas, subject to appropriate presumptions and procedures, the substantive legal standard remains the "best interests of the child" as defined in Section 3 of the Act.

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By its very terms, MCL 722.23 refers to the "parties involved" not the "competing parents." The original language of the Act did refer only to the "parents," but was amended by the Legislature to include all "parties," evidencing a clear legislative intent to apply the statutory "best interests" definition to all forms of custody and visitation disputes, including grandparent visitation requests. Never before has a Michigan appellate court declared this elaborate and well-defined "best interests of the child" legal standard constitutionally insufficient.

The well-defined concept of "best interests of the child" already contains within it sufficient guidance for the trial courts in deciding grandparent visitation matters. As noted above, not only is the statutory definition (MCL 722.23) expansive, but there are dozens of decisions from the Court of Appeals and this Court addressing and affirming virtually every nuance of the "best interests" test. If that weren't enough, the State Court Administrative Office (SCAO), through its Friend of the Court Bureau (FOCB), has published at least three substantial bodies of work adding even greater detail and guidance to the "best interests" standard.

In March of 1991, the SCAO adopted and published the Michigan Custody Investigation Model. If the existing statute and case law were not guidance enough, we now have a comprehensive manual that tracks each of the "best interests" factors contained in MCL 722.23 and describes how they are to be applied. In addition, applying the same substantive "best interests of the child" standard, we now also have both a Michigan Parenting Time and Change of Domicile Evaluation Model and a Michigan Parenting Time

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RICHARD S. VICTOR, PLLC
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Guideline. Both were published by the SCAO and the latter is available for download in the Public Programs section of this Court's website.

The best interests factors contained in MCL 722.23 are so comprehensive and so detailed (especially when coupled with case law interpretation and the SCAO manuals) that any factor this court would have the trial court's consider in evaluating grandparent visitation requests could easily be accommodated withing the language and structure of the existing statute. It was simply incorrect for the majority in the Court of Appeals ***DeRose*** decision to conclude that the law lacked guidelines for the Court to utilize when deciding grandparent visitation cases. Therefore, it was clearly erroneous to declare the statute unconstitutional.

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RICHARD S. VICTOR, PLLC
100 WEST LONG LAKE ROAD • SUITE 250 • BLOOMFIELD HILLS, MI 48304 • TELEPHONE (248) 646-7177 • FACSIMILE (248) 646-9722

CONCLUSION/RELIEF REQUESTED

Not only is the Court of Appeals majority opinion in the instant case based on a misreading of the constitutional issues presented by grandparent visitation, especially in the context of a limited statute such as Michigan's, it is also based on a misreading of the very authority upon which the opinion is based. The U.S. Supreme Court's decision in ***Troxel v Granville*** received much attention from the popular press when it was released. Not surprisingly, almost every media outlet got it entirely wrong. While the parties seeking visitation in ***Troxel*** just happened to be grandparents, they filed their request for court ordered visitation under a general third-party visitation statute that bears no resemblance to any existing grandparent visitation statute, including Michigan's. As such, ***Troxel*** was not a decision addressing the constitutional merits of grandparent visitation. It was nothing more than a reaffirmation of a parent's constitutionally important, **but not absolute**, role in decision-making for his/her children.

In that context, it is sadly not surprising that the panel below incorrectly stated that Washington's grandparent visitation statute had been invalidated in ***Troxel***. In fact, the limited Washington grandparent visitation statute, like nearly all limited grandparent visitation statutes, remains constitutionally valid and in effect.

Equally problematic is the panel's failure to recognize that its decision is logically and legally inconsistent with the prior published decision in ***Heltzel v Heltzel***. Although ***Heltzel*** was released after the instant case was argued, approximately three months passed between the release of ***Heltzel*** and the release of the opinion in the instant case. Not only

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RICHARD S. VICTOR, PLLC
100 WEST LONG LAKE ROAD • SUITE 250 • BLOOMFIELD HILLS, MI 48304 • TELEPHONE (248) 646-7177 • FACSIMILE (248) 646-9722

was the panel below bound by ***Heltzel***, but the compelling logic of Judge Gage's opinion in ***Heltzel*** should have influenced the panel to revisit **its willingness to so easily usurp legislative power and declare a statute facially invalid**. The reality of "family" has changed significantly in recent decades. The concept of parental autonomy, grounded in the assumption that parents raise their own children in nuclear families, is no longer to be taken for granted. According almost absolute deference to parental rights is now less compelling because the traditional nuclear family has eroded. Grandparent visitation laws did not create that erosion. More varied and complicated family structures have arisen because of divorce, decisions not to marry, single-parent families, remarriages and step-families, parents who abandon their children to grandparents, and children being raised by third parties because parents are unable to care for their own children. It would be a significant disservice to the children of our state, who look at their families through their own eyes, to ignore their reality of what family is to them. We must recognize that in some families the parents are not necessarily legally related to the same people as their children.

A woman who divorces her husband or a mother of children whose father has died may no longer be related to the grandparents of her children, but the children still have a connection through bloodline and heritage to their grandparents. **They are family to that child**.

Grandparent visitation laws conditioned on visitation being in the child's best interest express a fundamental liberty interest to both grandparent and grandchild. Should a parent, only one in the chain of three generations, be given constitutional sanction to amputate the

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RICHARD S. VICTOR, PLLC
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family unit of the child? Fortunately the United States Supreme Court said NO! By holding that these cases must be decided on a "case by case basis," the majority of the Supreme Court held that the millions of grandparents and grandchildren who have been reunited because of laws protecting their rights, will not be threatened with amputation by critics who claim that these laws were unconstitutional.

In summary, this Court should reverse the Court of Appeals majority opinion in this matter. Michigan's grandparent visitation statute is narrowly drawn to accomplish a legitimate state purpose. Furthermore, the statute, when read as a part of the overall Child Custody Act, provided adequate guidance to the trial courts along with the requisite deference to parental decision-making. It is not necessary to completely obliterate the rights of children to maintain contact with those they love in order to properly recognize the rights of parents.

Respectfully submitted,

Law Offices of Richard S. Victor, PLLC

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By:_____
Richard S. Victor (P24827)

By:_____
Daniel R. Victor (P64703)

By:_____
Scott Bassett (P33231), Of Counsel
Attorneys for Third-Party Plaintiff-Appellant